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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1460

STATE NATIONAL BANK OF ALABAMA, ET AL.,
Petitioners,

v.

WILLIAM H. ELLIS,
Respondent,

and

CENTRAL BANK AND TRUST COMPANY and
STATE NATIONAL BANK OF ALABAMA,
Petitioners,

v.

THE AMERICAN NATIONAL BANK OF GADSDEN,
ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THE AMERICAN NATIONAL BANK
OF GADSDEN, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, State National Bank of Alabama; Central Bank and Trust Company; the following persons in their capacities as members of the board of directors of State National Bank of Alabama: J. W. Wyker, Jr., John A. Frey, J. Frank Scroggins, C. D. Cottingham, C. W. Nelson, Mims Rogers, C. Wilson Taylor, Jr., M. H. Lanier, H. W. Agricola, H. C. Parker, Jr., and R. C. Patrick, Jr.; the following persons in their capacities as members of the

board of directors of Central Bank and Trust Company: Harry B. Brock, Jr., Schuyler A. Baker, R. Hugh Daniel, Marshall Durbin, Jr., John C. Evins, Frank L. Hardy, Inos A. Heard, John R. Israel, Jr., Thomas E. Jernigan, J. Wallace Nall, Dr. Wendell H. Taylor, and Stewart H. Welch, Jr.; respectfully pray that a writ of certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 28, 1970.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, not yet reported, appears in Appendix A hereto on page 1A. The opinion of the United States District Court for the Northern District of Alabama, which is unreported, appears in Appendix B hereto on page 23A.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 28, 1970. A timely petition for rehearing *en banc* was denied on December 29, 1970, and this petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. What is the condition precedent prescribed by Congress in 12 U.S.C. §214c which state law must satisfy before

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[1] The respondents to this petition are: William H. Ellis; The American National Bank of Gadsden; The Citizens Bank, Oneonta; The First National Bank of Guntersville; The First National Bank of Huntsville; Birmingham Trust National Bank; City National Bank, Birmingham; Exchange Security Bank, Birmingham; and The First National Bank of Birmingham.

a national bank can transfer out of the national banking system into a state banking system pursuant to the authority set forth in 12 U.S.C. §§214-214b?

2. Does a state statute which authorizes a state bank to *convert* into a national bank and also to *combine* with a national bank satisfy the requirement imposed by 12 U.S.C. §214c that a state statute authorize a state bank to *"convert into and merge or consolidate with"* a national bank?

STATUTES INVOLVED

12 U.S.C. §§ 214-214c and Title 5 §§181-184 Code of Alabama 1940 (Recomp. 1958) are set forth as Appendix C hereto, pages 29A through 35A.

STATEMENT OF THE CASE

State National Bank of Alabama (State National) is a *national banking association* organized under the laws of the United States with its principal place of business in Decatur, Alabama. Central Bank and Trust Company (Central) is a *state banking corporation* organized under the laws of the State of Alabama with its principal office in Birmingham, Alabama.

During the summer of 1968, State National and Central commenced discussions concerning a possible merger of the two banks under the charter of Central, with the resulting bank being a state bank. Upon being advised of the possible merger, Honorable C. E. Avinger, as Superintendent of Banks of the State of Alabama, requested an official opinion from the Attorney General of Alabama concerning the legality of such a merger. One of the questions posed in such request was "Does such merger violate either federal or state laws?". In answer to this question, the attorney General of Alabama, by formal opinion dated September 30, 1968, advised the Superintendent of Banks that 12 U.S.C. §§214-

214c constitutes federal authorization for the merger if certain conditions therein contained are satisfied by state law; that such conditions are satisfied by state law; that state law does authorize the merger; and that there is no legal impediment to the merger of State National and Central under the charter of Central, with the resulting bank being a state bank.

Thereafter, the two banks entered into a formal agreement and plan of merger dated December 27, 1968. Under the merger agreement, State National is to merge with Central under the existing state charter of Central. The board of directors of each bank approved the merger agreement and called a special meeting of stockholders to consider and act upon such agreement.

The stockholders of both State National and Central approved the merger agreement by an overwhelming vote.

Shortly prior to the meetings of the stockholders of both banks, the proposed merger of Central and State National was challenged in the United States District Court for the Northern District of Alabama in two separate actions. The first, Civil Action 69-20, was brought by William H. Ellis, individually and as a stockholder of State National. The second, Civil Action 69-38, was brought by a group of eight Alabama banks, four of which, including the two largest banks in the state of Alabama, are located in Birmingham and are competitors of Central, the other four being located in North Alabama and are competitors of State National. Federal Deposit Insurance Corporation (FDIC) and the Superintendent of Banks of the State of Alabama were made defendants in both suits.[2] Neither of these two defendants

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2 The stockholder suit also named the directors of both banks as defendants.

participated in the appeal to the court below and they do not join in this petition.

The jurisdiction of the district court was invoked on the basis (a) that the suits present questions arising under federal laws, including the federal banking laws and anti-trust laws, and (b) that FDIC is a party. Both of these suits sought to enjoin the proposed merger on the basis that the merger (a) would violate federal banking laws contained in 12 U.S.C. §§214-214c, (b) would violate the branch banking laws of Alabama, and (c) would violate the federal anti-trust laws. Civil Action 69-20 was subsequently amended to charge violations of certain federal securities laws and regulations, but these issues are not involved herein.

The two suits were ultimately consolidated for trial. In a pretrial hearing, the court designated for early hearing the following threshold issues presented in both suits:

(1) Is the proposed merger legally permissible under existing state and federal law? and

(2) In the event the proposed merger is permissible, may the suriviving bank retain and operate each of the branches of both banks?

The parties entered into an extensive stipulation of facts, and the threshold issues were thus presented to the court as pure questions of law. The trial court rendered an opinion (Appendix B, page 23A) which held that Alabama law[3] does not satisfy the provisions of 12 U.S.C. §214c and that the authority to merge given by 12 U.S.C. §214a to national banks is therefore not available to national banks located in Alabama. The court enjoined the two banks and their directors from doing any acts which would effectuate the merger. The court also enjoined the Superintendent

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[3] Alabama Code, Title 5, Section 181-184 (set forth in full on pages 33A through 35A of Appendix C).

of Banks of Alabama from approving any such merger. Neither the opinion nor the order of the trial court dealt with the branch banking issue which was one of the two threshhold issues. Thus, the only issue determined in the trial court below and embraced in the appeal to the Fifth Circuit Court of Appeals involved a construction of 12 U.S.C. §§214-214c and the application of the laws of Alabama thereto.

On October 28, 1970, that Fifth Circuit Court of Appeals rendered an opinion[4] affirming the order of the trial court. Your petitioners seek a writ of certiorari to review such opinion.

REASON FOR GRANTING THE WRIT

An important question of federal law which has not been, but should be, settled by this Court is involved in this case.

The records of the federal banking agencies reflect numerous combinations of banks during prior years. Many of such combinations have occurred under the provisions of 12 U.S.C. §215 and its predecessor, 12 U.S.C. §34a, in which the transaction was cast in a manner that contemplated a continuation of the corporate entity and identity of at least one of the participating banks without creating a *new* corporation. Thus many of such combinations were cast by the parties as *technical mergers* rather than *technical consolidations.* The opinion of the lower court would expose to attack all of such transactions in that such opinion in effect holds that transactions under Section 215 and Section 34a must in legal effect be cast as *technical consolidations* in which a *new corporation* must be created.

If the opinion of the lower court stands, any bank now

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[4] Appendix A, page 1A.

existing in the national banking system which is the product of a combination under Section 215 or its predecessor, Section 34a, and which was not cast by the participants in such a form as to create a new banking corporation with a new charter is subject to attack on the grounds (a) that the transaction was not consummated in accordance with the applicable statute and (b) that the transaction is subject to unexpected taxable incidents, such as the levy of share issue taxes upon the stock distributed to shareholders of the participating banks. Moreover, valuable rights of stockholders of the banks participating in the transaction could be challenged and imperiled in each case where the transaction was not handled as a technical consolidation which the lower court in effect holds must have been the case under Section 215 or Section 34a. In this connection see *Fidelity-Baltimore National Bank v. United States,* 328 F.2d 953 (4th Cir. 1964) wherein the Fourth Circuit reached a conclusion contrary to that of the lower court.

The holding of the lower court deprives any national bank located in a state such as Alabama of the opportunity to use the authority of 12 U.S.C. §§214-214c[5] if the state law authorizes *conversions*[6] of state banks into national banks and *combinations* of state banks with national banks *but does not use the language of "merger" in authorizing the combinations.* This result is counter to the manifest policy of Congress in that it frustrates transfers of banks from the national banking system to the state banking system under the provisions of 12 U.S.C. §§214-214c[7] even

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5 Set forth in full in Appendix C, page 29A.

6 Conversion involves a single bank changing from one banking system to the other.

7 The Report of the Senate Committee on Banking and Currency prepared in connection with the enactment of 12 U.S.C. §§214-214c succinctly sets forth this policy of Congress. A portion of such report is set forth in Appendix C, page 36A.

though state banks in such states are free to transfer into the national banking system under the provisions of 12 U.S.C. §35, 12 U.S.C. §215, and 12 U.S.C. §215a.

The question of federal law sought to be reviewed involves the intent of Congress in *1950* when it enacted 64 Stat. 455, which, as amended, is now codified as 12 U.S.C. §§214-214c (Appendix C, page 29A). This statute is the only federal authority for the transfer of a national bank *from the national banking system into the state banking system*. It authorizes the transfer by allowing a national bank to *change into* a state bank ("conversion")[8] and it authorizes the transfer by permitting a national bank to *combine with* a state bank under the state bank's charter ("merge or consolidate"). However, the authority thus conferred was not without a condition precedent being attached thereto. The condition precedent, contained in 12 U.S.C. §214c, reads in part as follows:

> ". . . no such conversion, merger, or consolidation shall take place under said sections unless under the law of the State in which such national banking association is located State banks may without approval by any State authority convert into *and* merge *or* consolidate with national banking associations under limitations or conditions no more restrictive than those contained in section 214a of this title . . ." (Emphasis supplied)

Thus the statute by clear and unambiguous language requires state law to authorize (a) the conversion of a state bank into a national bank *and* (b) the combination of a state bank with a national bank, whether the combination be a merger *or* consolidation, before a national bank in the

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[8] Conversion involves a single bank changing from one banking system to the other.

particular state can take full advantage of the authority conferred by 12 U.S.C. §214a.

It is significant in determining the intended meaning of the condition in question that Congress used the word "and" together with the word "or" in the same phrase with only one word separating them. In so using these words, Congress clearly had in mind dealing with *two* separate basic concepts: (1) the converting of a single state bank into a single national bank, and (2) the combining of one or more state banks with one or more national banks. In prescribing these two concepts, Congress used the word "and"[9] because it intended for both means of transfer of banks into the national banking system to be available. However, in dealing with the second concept, i.e., the combination of banks, Congress recognized that combinations of corporations are sometimes expressed by state laws in terms of merger and at other times expressed by state laws in terms of consolidation. Therefore, Congress used both the word "merge" and the word "consolidate" but connected the two by the use of the word "or,"[10] *presenting an alternative approach*

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9 The plain and literal meaning of the word "and" is that it is a *conjunctive* particle used to connect words, phrases or clauses. When the word "and" is used, each of the connected words, phrases or clauses has an obligatory or compulsory field of operation in the idea or thought being expressed. That is to say, the words, phrases or clauses connected by the word "and" are not used for the purpose of providing alternates.

10 The plain and literal meaning of the word "or" is that it is a *disjunctive* particle used to connect words, phrases or clauses where alternatives are being offered. This word is used to connect a series of words or propositions presenting a choice of either. The word is used in its usual sense to joint alternative terms expressing unlike things or to join alternative terms expressing the like thing. The central point is that when "or" is used in its literal sense, an alternative is always intended. However, when the word "and" is used, all ideas or words connected are cumulative. The point is discussed in 50 Am. Jur., *Statutes*, §§281 and 282.

to the combination concept. Having just previously used the word "and" when it was prescribing the requirement of the two concepts, surely Congress would have used the conjunctive particle "and" instead of the disjunctive particle "or" between the word "merge" and the word "consolidate" had it intended to require the requirement that state law provide for *both* a merger and a consolidation as separate and distinct concepts within the general concept of combination.

The lower court, however, concluded (Appendix A, page 5A) that the condition precedent set forth in 12 U.S.C. §214c and quoted above is so unclear as to require "the necessity of judicial interpretation of the staute" and that "resort must be had to legislative history to determine Congressional intent."

Petitioners maintain that such Section 214c is clear on its face and that when the language is given proper legal effect, the conditions of state law therein prescribed are satisfied in this case. However, petitioners further maintain that had the court below properly reviewed the legislative history and not overlooked or misapprehended relevant statutes and legislative history, it would have reached a conclusion opposite from the erroneous one reached.

The court below erroneously concluded that Congress, in adopting Section 214c in 1950, intended to require state law which dealt with merger and consolidation in a strict technical sense.[11] Thus, it concluded that in order for a

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11 "Strictly speaking, a *consolidation* signifies such a union as necessarily results in the *creation of a new corporation* and the termination of the constituent ones, whereas a *merger* signifies the absorption of one corporation by another, which *retains its name and corporate identity* with the added capital, franchises, and powers of a merged corporation."—Fletcher Cyclopedia Corporations, Section 7041 (Per. Ed., 1961 Revised Vol.) (Emphasis added)

national bank to *combine* with a state bank in a particular state in the form of a technical *consolidation,* the state law must authorize a state bank to *consolidate* in a technical sense with a national bank. Likewise, it concluded that in order for a national bank to *combine* with a state bank in a particular state in the form of a technical *merger,* the state law must authorize a state bank to *merge* in a technical sense with a national bank.

The lower court therefore *penalized* State National and Central simply because they cast their combination in the form of a technical merger rather than a technical consolidation, *expressly finding that a technical consolidation would have been permissible* (Appendix A, page 3A). In inflicting such penalty upon the two banks, the lower court failed to recognize that the wording of 12 U.S.C. §214b *required that the combination be cast as a technical merger.* See 12 U.S.C. §214b where the language expressly requires that the bank resulting from a combination under 12 U.S.C. §214a must be "the same business and corporate entity" as the national bank participating in the combination. This clearly requires that the combination be a technical merger rather than a technical consolidation through which the corporate entity of both banks disappear and a new corporation is formed.

The correctness of the holding of the Court of Appeals rests upon a determination that in the use of the word "merge" and the word "consolidate" in Section 214c Congress was using such words in their respective strict technical sense. The first error in this determination is identified when it is recognized that in 1950 at the time Congress adopted Section 214c *there was no provision in the federal law* for the implementation of two separate and distinct methods of combining a state bank with a national bank under the charter of a national bank. In 1950, there was

provision in federal law for *only one method of combining* a state bank with a national bank, 12 U.S.C. §34a.

The court below attempted to get around the absence of the second method of combination at the time *(1950)* Congress adopted Section 214c by relying upon a subsequent statute adopted by Congress in *1952*[12] which the court concluded was adopted by Congress for the purpose of providing a separate and distinct method of combination, to wit, to provide for "merger" in a technical sense. In reaching its conclusion concerning the purpose of the 1952 statute[12], the court quoted *selected portions* of a committee Report.[13] Examination of the *full report* (Appendix C, page 39A) reveals the *pertinent* portions of the Committee Report overlooked by the court which portions state in unequivocal terms the purpose of the 1952 statute and *make it clear that the purpose of such statute was to provide a method of combining banks which would accord different treatment of the rights of dissenting stockholders* than the treatment of such rights in 12 U.S.C. §34a, which was subsequently materially changed and recodified as 12 U.S.C. §215. The only significant difference between the 1952 statute[14] and the then existing 12 U.S.C. §34a deals with rights of dissenting stockholders. Contrary to the conclusion reached by the court below, this 1952 statute was *not* designed to engraft a method of combining banks to complement 12 U.S.C. §§214-214c.

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12 66 Stat. 599, which was originally codified in 12 U.S.C. §§ 34b and 34c, and later (1959) re-enacted and codified as 12 U.S.C. §215a.

13 Report of the Committee on Banking and Currency, House Report No. 2421, 1952 U.S. Code Cong. and Adm. News, Vol. 2, p. 2133 (Appendix C, page 39A).

14 66 Stat. 599, which was originally codified as 12 U.S.C. §§34b and 34c, and later (1959) re-enacted and codified as 12 U.S.C. §215a.

Further support for the position that Congress was *not* undertaking to create authority for technical "mergers" and technical "consolidations" is disclosed in hearings before the House Committee on Banking and Currency considering Senate Bill 2128 (enacted as 66 Stat. 599, codified as 12 U.S.C. §§34b and 34c). There Mr. L. A. Jennings, Deputy Comptroller of the Currency, explained the purpose and effect of the Bill.[15] It is clear from Mr. Jennings' statement that, for purposes of the national banking laws, "fundamentally, there is no difference between a consolidation and a merger." He stated that "the technical form is exactly the same." More significantly, Mr. Jennings stated that the purpose of the Bill (Senate Bill 2128) was to provide a new method of combining banks "where only the shareholders of the small bank being absorbed would have the right to dissent, and the shareholders of the large institution would not have that right." Immediately thereafter he stated: "I think that pretty well sets forth the main object that the bill will accomplish."

Notwithstanding the above discussed Committee Report and the statement of Mr. Jennings, the lower court adopted as one of its basic premises the erroneous conclusion that this 1952 statute[16] was enacted for the purpose of creating authority for the merger in a technical sense of a state bank into a national bank. In an effort to support the foregoing erroneous conclusion, it became necessary for the lower court also to analyze another federal statute dealing with the combination of state and national banks. However, in undertaking this exercise, the court failed to focus on 12

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15 Miscellaneous Hearings, Committee on Banking and Currency of House of Representatives, 82nd Congress, June 23, 1952 (Document No. 91117), pp. 101, et seq.

16 Originally codified as 12 U.S.C. §§34b and 34c and later (1959) re-enacted in substantially the same form and recodified as 12 U.S.C. §215a.

U.S.C. §34a and erroneously focused on 12 U.S.C. §215, which is a 1959 substantial revision of 12 U.S.C. §34a. Had the court not overlooked such Section 34a (which as stated above was the *only* federal law providing for the combining of state banks with national banks to operate in the national banking system prior to the 1952 merger statute) and had the court instead made an analysis of the language of such Section 34a, it *should* have concluded that the federal law prior to 1952 as well as prior to 1950 did *not* provide for a consolidation in a technical sense. Such Section 34a, like the 1952 merger statute (12 U.S.C. §§34b, and 34c, since 1959 codified as 12 U.S.C. §215a), also provided for a combination which in effect is a merger in a technical sense.

The lower court quoted from 12 U.S.C. §215 and concluded from the quoted language that "it provides for a technical consolidation." (Appendix A, page 11A). Had the appropriate language from 12 U.S.C. §34a been considered instead of the language from Section 215, the lower court *should* have concluded that federal law in 1950, as well as in 1952, did *not* provide for a "technical consolidation." As a convenience to this Court, we are setting forth below corresponding language drawn from Section 34a and from Section 215:

12 U.S.C. §34a
as it appeared in 1950 and in 1952[17]

> "Any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, may *be consolidated with* a national banking association located in the same State, county, city, town, or village *under the charter of such national banking association . . .*" (Emphasis added by Petitioners)

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17 44 Stat. 1225, as amended by 48 Stat. 190, as further amended by 49 Stat. 719.

12 U.S.C. §215
as adopted in 1959 to amend Section 34a[18]

> " (a) Any national banking association or any bank incorporated under the laws of any State may, with the approval of the Comptroller, *be consolidated with* one or more national banking associations located in the same State under the charter of *a* national banking association . . ." (Emphasis added by the lower court, Appendix A, page 11A)

The conclusion by the lower court that Section 215 "provides for a technical consolidation" apparently was reached because the language of such Section 215 *does not require the continuation of either of the consolidating banks and admits of a construction that the consolidated banking association can function under a charter different from that of one of the participants to the combination.* However, had the court been viewing the language of Section 34a, the pertinent statute set out above, it would have been compelled to reach the conclusion that, in 1950 (as well as in 1952), a combination of a state bank with a national bank could take place *only under the charter of the participating national banking association.* It necessarily follows that under Section 34a there is a continuation of the corporate identity of the national banking association and the resulting corporation does *not function under a new charter.* Therefore, a combination under such Section 34a resulted in a technical merger and did not result in a technical consolidation.

The conclusion that such Section 34a, as it existed in 1950 (as well as in 1952) in legal effect provided for a technical merger and not a technical consolidation is also sup-

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[18] 73 Stat. 457, 460.

ported by all the court decisions which have involved the question of whether a combination of banks under such Section 34a provided for a new corporation and the termination of the participants to the combination and thus constituted a technical consolidation, or whether a combination under Section 34a resulted in a continuation of the corporate entity and identity of one of the participating banks and thus constituted a technical merger.[19] In the *Fidelity-Baltimore* case,[19] the 4th Circuit held that a combination under Section 34a "was accomplished as a traditional merger" and "that it be achieved in that manner is a specific requirement of the National Banking Act." Other cases reviewing a similar banking statute, 12 U.S.C. §33, have reached a similar conclusion.[20]

The conclusion by the lower court that the federal law providing for combining state and national banks prior to the 1952 merger act provided for a technical consolidation is *simply erroneous; it is contrary* to the plain wording of such Section 34a which was overlooked by the lower court in its analysis of legislative history; *it is contrary* to legislative history surrounding the national banking laws; and *it is contrary* to all established precedents in the federal courts. Moreover, as a result of the opinion below, *national banks* located in Alabama (and any other state in similar circumstances) *are denied the right* to transfer into a state banking system by merging with a state bank *while state banks have such a right* in reverse.

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19 *Fidelity-Baltimore National Bank v. United States,* 328 F.2d 953, 958 (4th Cir. 1964); *Old National Bank in Evansville v. Commissioner,* 256 F.2d 639 (7th Cir. 1958); *United States v. Northwestern National Bank & Trust Co. of Minneapolis,* 137 F.2d 761 (8th Cir. 1943); *Ex parte Worcester County National Bank of Worcester,* 279 U.S. 347, 357 (1928).

20 *Defoe v. Board of Public Instruction of Alachua County, Fla.,* 132 F.2d 971 (5th Cir. 1943); *Cannon, et al. v. Dixon,* 115 F.2d 913 (4th Cir. 1940).

Had the lower court given the legislative history relating to Section 214c proper and thorough analysis, it would have found that in 1950 when Congress adopted Section 214c federal law did *not* provide for three separate and distinct methods of transfer as the lower court assumes in its conclusion. Proper analysis of the legislative history discloses that in 1950, when Congress adopted Section 214c, there were *only two methods of transfer,* these being the method of conversion embodied in such 12 U.S.C. §35, and the one combination method embraced in 12 U.S.C. §34a which, as shown, in legal effect provided for a technical merger. It follows, then, that the lower court erred in engrafting upon Section 214c a purported intent by Congress to require state law fitting the mold of the three-concept or three-method theory. Moreover, even assuming, without admitting, that Congress, when it adopted Section 214c in 1950, anticipated that the 1952 Congress would adopt the 1952 merger statute (66 Stat. 599, codified as 12 U.S.C. §§34b and 34c), the adoption of such merger statute *does not serve to supply a third method of transfer* insofar as a technical conversion, consolidation and merger are concerned. The 1952 merger statute, 12 U.S.C. §§34b and 34c, merely provided *another method of transfer which in legal effect was a merger,* the same as the existing law, 12 U.S.C. §34a, but which did afford and had as its purpose a treatment with respect to the rights of dissenting shareholders different from the existing law.

The erroneous result reached by the lower court is manifested by that court's overlooking Section 34a and *mistakenly relying upon* Section 215 and comparing it to Section 215a to support its erroneous conclusion that "Congress intended and advisedly used the terms consolidation and merger in their strict technical sense."[21] Proceeding from this errone-

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21 Appendix A, page 12A.

ous conclusion the lower court went on to hold that in adopting Section 214c Congress was requiring state law to provide for merger in its technical sense if a national bank in the particular state desired to merge with a state bank in such state pursuant to the provisions of 12 U.S.C. §214a. However, the lower court's conclusion in this regard is further belied by the legislative history developed in connection with *the 1952 amendment of Section 214c.*

The Committee Report[22], which the lower court overlooked, shows that it was the purpose and intent of Congress in its adoption of 12 U.S.C. §§214-214c to deny to national banks all methods of transfer into the state banking system if state law merely authorizes consolidation of a state bank and a national bank on appropriate terms and does not authorize the conversion of a state bank into a national bank on appropriate terms. The Committee Report explaining the purpose of such 1952 amendment of Section 214c (66 Stat. 590) refers to laws in certain states (using Minnesota as an illustration) which failed to meet the conditions imposed by Section 214c as it existed before such amendment. The Committee Report explains that Minnesota, while having authorized consolidations on appropriate terms, failed to authorize *conversions* on appropriate terms. The Committee Report makes it clear that because of this failure of Minnesota (and other states) to satisfy the provisions of Section 214c with respect to transferring from the state system to the national system by a *conversion, all transfers* (which would include consolidations and mergers, as well as conversions) otherwise available pursuant to Sections 214-214b from the national system to the state system *were completely cut off.*

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22 House Committee on Banking and Currency, Report No. 2422, as set forth in 1952 U.S. Code Cong. & Adm. News, Vol. 2, page 2103. (Appendix C, page 42A).

The theory and construction of Section 214c adopted by the lower court is completely inconsistent with and incompatible with the legislative history embraced in such Committee Report which was developed at the time of the 1952 and only amendment to Section 214c.

Since Congress in its enactments of the federal banking law provisions preceding the adoption of Section 214c had not legislated with respect to both merger and consolidation in their strict technical senses, but had, on the contrary, legislated with respect to one method of combination which Congress in its language referred to as consolidation, but which, in legal effect, created a merger, it is inconceivable that Congress would have intended in its adoption of Section 214c to use for the first time the words "merge" and "consolidate" in their respective technical senses for the purpose of requiring the states to fashion laws authorizing state banks to transfer into the federal system by means of a technical merger *and* a technical consolidation when such state laws, as they would relate to consolidation in its technical sense, would be wholly futile and would have no field of operation since federal law did not permit such consolidation. To state it differently, *why would Congress intend by Section 214c to require state laws dealing with merger and consolidation in a technical sense in view of the federal law existing in 1950 which would not accommodate such laws?*

The legislative history shows that in enacting 12 U.S.C. §§214-214c the intent of Congress was to authorize the transfer of banks from the national system into the state system and thus complement previous legislation authorizing the transfer of banks from the state system into the national system.[23] This history shows that when Congress enacted

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[23] Also see Report of Senate Committee on Banking and Currency, 1950 U.S. Code Cong. Serv., Vol. 2, p. 3012 (Appendix C, page 36A).

12 U.S.C. §§214-214c, there were two basic methods by which state banks could transfer into the national system. One was by converting into a national bank as provided for in 12 U.S.C. §35. The other was by combining with a national bank as provided for in 12 U.S.C. §34a. Therefore, it became incumbent upon Congress, if it were to provide complementary authorization for the transfer of banks from the national banking system into the state banking system, to authorize two basic methods of transfer. This it did.

Since Congress had not, prior to 1950, undertaken to express its intention with respect to the combination of banks by the usage of the terms "merge" and "consolidate" in their technical sense, it is not surprising that when Congress undertook to enact Sections 214-214b it did not undertake to utilize the words "merge" or "consolidate" in their technical sense. Congress used sufficient language fully to authorize the transfer of banks from the national banking system into the state banking system by either of two basic methods: (a) conversion, and (b) combination. In fully expressing itself with respect to the authority for national banks *to combine* with state banks, Congress circumspectly used disjunctively both the words "merge" and "consolidate" and their respective derivations.

Consistent with the authorization embodied in Sections 214-214c relating to transfers from the national system to the state system and to make certain that such authorization did not result in transfers from the national system into the state system in those states which had not authorized transfers from the state system into the national system, Congress prescribed the condition precedent found in Section 214c. The language of Section 214c, when given its plain meaning, imposes a requirement that state law authorize two

basic methods of transfer from the state system into the national system for which the federal laws had previously provided. Again, in order fully to cover the method of combination, it used *disjunctively* as alternatives both the word "merge" and the word "consolidate." These words clearly were used as alternatives by being separated by the disjunctive particle "or" but were connected to the other basic method of transfer ("conversion") by the conjunctive particle "and."

The Court of Appeals notes that Alabama law[24] authorizes a state bank to transfer into the national system without approval of the State Banking Superintendent by (a) converting into a national bank or (b) consolidating with a national bank. However, the lower court finds this law inadequate to satisfy the Section 214c condition precedent for the *sole* reason that it does not also authorize in express terms the transfer of a state bank into the national banking system *in the form of a technical merger.* Thus, had the lower court correctly construed the conditions precedent set forth in, and intended by Congress when it adopted the statutory provisions now codified as, 12 U.S.C. §214c, it would have been forced to conclude that the Alabama law does in fact satisfy such conditions precedent.

CONCLUSION

As stated in the foregoing argument, this case presents to this court an important question of federal law, which is of national concern, and which has not been, but should

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[24] Title 5, Section 181-184 of the Alabama Code, Appendix C, page 33A.

be settled by this court, and for this reason, certiorari should be granted in this case.

Respectfully submitted,

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APPENDIX A

OPINIONS AND JUDGMENT OF COURT OF APPEALS

OPINION

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28452

WILLIAM H. ELLIS,
Plaintiff-Appellee,

versus

STATE NATIONAL BANK OF ALABAMA, ET AL.,
Defendants-Appellants,

and

THE AMERICAN NATIONAL BANK OF GADSDEN, ET AL.,
Plaintiffs-Appellees,

versus

CENTRAL BANK AND TRUST COMPANY, ET AL.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Alabama

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(October 28, 1970)

Before SIMPSON, MORGAN and INGRAHAM, Circuit Judges.

SIMPSON, Circuit Judge: State National Bank of Alabama (State National) is a national banking association organized under the laws of the United States with its principal place of business in Decatur, Alabama. Central Bank and Trust Company (Central) is a state banking corporation organized under the laws of the State of Alabama with its principal office in Birmingham, Alabama. This litigation was generated when the banks sought to merge State National with Central under Central's state charter

William Ellis, a stockholder of State National, brought a shareholder's derivative suit seeking to block the proposed merger. In a separate suit, The First National Bank of Birmingham and seven other banks[1] also sought to prevent the merger. Both actions were filed in the Northern District of Alabama. They were consolidated. The parties sought a declaration of (1) whether the proposed merger violated federal banking laws contained in Title 12, U.S.C., Sections 214-214c, (2) whether the branch banking laws of Alabama would be violated by the proposed merger, and (3) whether the proposed merger violated the federal antitrust laws.

In the trial below, the first two issues were separated for trial. The antitrust question was not considered. Since all the relevant facts were stipulated, we deal, as did the court below, with legal issues only. The trial court, in its order, found that the merger was invalid because it violated federal law, and thereupon found it unnecessary to decide the branch banking issue. We affirm.

The ultimate determination of this case rests upon an examination and interpretation of the interplay between federal and Alabama statutes. Under the provisions of Title

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[1] Four of the eight banks are located in Birmingham and compete with Central. The other four banks are located in a North Alabama county in which State National maintains a branch office.

12, U.S.C., Sections 214-214c, Congress has authorized national banks to merge into state banks if state law is not contravened and if state banks in the particular state can "without approval by any state authority *convert into and merge or consolidate with* national banking associations under limitations or conditions no more restrictive than those contained in Section 214a". (Emphasis added)

The undisputed purpose of these statutes which were first enacted in 1950, is to promote equality between the federal and state banking systems. Prior to this legislation state banks could convert into or consolidate with national banks but there was no corollary and corresponding provision allowing national banks to convert into or consolidate with state banks. Congress attempted to rectify this inequity by permitting national banks to join state systems with the proviso that such transfers were permissible only to the extent that state banks could freely move into the national system.

Under 5 Alabama Code, Sections 181-184, any state bank is allowed to "convert into" or "consolidate with" a national bank without approval of the State Banking Superintendent. Clearly if the appellant national bank desired to convert into or consolidate with an Alabama state bank it could do so without controversy. It is crucial to note that the Alabama statute makes no specific reference to mergers with national banks. Merger is dealt with in Title 5 Alabama Code, Sections 170-175, which pertain to any bank doing business in the state of Alabama. These statutes require approval of a merger by the State Banking Superintendent. The district court thus concluded:

> "The language used by Congress throughout the statute is inducive in construing the statute to mean, that unless a State bank can convert into, merge with

and consolidate with a national bank without State approval, then a national bank can convert into, merge with and consolidate with a State bank. *In other words, if a national bank and a State bank wish to merge, with the surviving bank to be the State bank, the law of the State where the national bank is located must allow a State bank to merge with a national bank without approval of any State authority.* Under existing Alabama law, this cannot be accomplished. This construction certainly is the most logical in light of the Congressional intent to keep the national and state banking systems on an equal level of operation as illustrated by the legislative history of Section 214c." (Emphasis added)

I.

Federal Law

A. *"And-or"*

Title 12, U.S.C., Section 214c states in part: "no such conversion, merger or consolidation shall take place . . . unless . . . state banks may without approval by any State authority *convert into and merge or consolidate* with national banking systems." (Emphasis added)

The appellants rely on the common rubric of statutory construction that a statute is open to construction only when the language used in the statute is ambiguous. The appellants assert that there is no ambiguity in the statute and that it is open to a single meaning only. The appellants argue that Congress made its intent crystal clear by using the conjunctive "and" between convert into and merge and the disjunctive "or" between merge and consolidate with. The appellants urge that by using the words "and" - "or" in

such a precise manner Congress unquestionably meant to require that state law must provide for an unfettered transfer of a state bank to a national bank in two instances: conversion and corporate combination (either a merger or a consolidation). The appellants' ultimate contention is that the district court erroneously construed the statute to require three reciprocal transfer provisions; i.e. conversion, consolidation, *and merger.*

If the appellants' position is accepted, the district court must be reversed because the applicable Alabama law, Title 5, Alabama Code, Sections 181-184, clearly permits corporate combination. The statutes provide for the unfettered transfer of a state bank into the national banking system and consolidation (a form of corporate combination) with a national bank.[2]

Study of the statute convinces us that the meaning of the statute cannot be gleaned from the simplistic but rigid device of grammatical construction, parsing or cl? .ification. We disagree that the wording is so clear as to preclude the necessity of judicial interpretation of the statute. We are convinced that resort must be had to the legislative history to determine Congressional intent and the real meaning of the statute.

The appellants make much of the fact that the "and-or" phraseology is used only once in the entire statutory scheme. Section 214a authorizes a national bank to convert into *or* merge *or* consolidate with a state bank. The appellants suggest that the disjunctive "or" in Section 214a is deliberately

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[2] To facilitate discussion, this opinion will frequently refer to "national to state" or "state to national" transfers. Use of these phrases is intended as shorthand terminology describing on the one hand the movement of a national bank to the state system, or on the other hand the transfer of a state bank to the national system.

used so as to authorize national to state transfers by any of the three methods. In like manner the appellants reason that the "ors" contained in Section 214a (a) and Section 214a (b) are deliberately used so as to give the statute operative effect.

The appellants logically contend that the exclusive use of the "and-or" language in 214c is no less deliberate. The phrascology in 214c describes the conditions that state law must meet in order for a national bank to transfer into the state system. Appellants' theory is that Congress by the use of the precise words "and - or" is specifying that in order for the state to comply with the terms of the statute the state law must provide authority for the unrestricted transfer of a state bank into a national bank by way of conversion and *either* consolidation *or* merger. The final effect of the appellants' analysis is that the separate terms, "merger" and "consolidation," are used in Section 214c as mere synonyms to connote a generic concept of corporate combination.

We do not agree that Congress used its "ands" and "ors" in the rigid manner suggested by the appellants. In the Act's title and in the committee reports, the words "and" and "or" are used in random fashion. For example the Act's title, as reprinted in 1950 U.S. Code Cong. Serv., p. 462, reads:

> "An act to provide for the conversion of national banking associations into *and* their merger *or* consolidation with State banks, and for other purposes." (Emphasis added).

The significance of the language is that the title describes essentially what is contained in Section 214a. The appellants, as previously stated, contend that the disjunctive "or" is essential to the meaning of Section 214a. Yet Congress, when describing the Act used the same "and-or" language

which the appellants assert is unique to and used with specifically in Section 214c.

In the introductory paragraph of the Senate Committee Report[3] the words "and"-"or" are used to describe national to state transfer, the subject matter of Section 214a. Conversely, the same report when addressing itself to the subject matter of Section 214c (state to national transfers) uses the phrase "convert into *or* merge *or* consolidate." (Emphasis added).

These illustrations adequately demonstrate that Congress had no deliberate design in using "and" or "or" in the statute. Thus we must reject the appellants' theory. The "and-or" language in Section 214c does not dictate the conclusion that Congress intended to use the terms, merger and consolidation, simply as synonyms. Such conclusion can only be reached, if at all, after careful review of the legislative history.

B. *Congressional Intent*

The interpretative artillery is drawn forth and a bitter battle is waged by the parties as to the intent of Congress. As might be expected the issue is sometimes clouded by extraneous firepower. It is interesting to observe the tactical switch of the parties.

The appellants, who were repelled at the possibility that Congress might have used the words "and" - "or" without deliberate thought, now suggest that Congress had no concrete concept of the technical differences between consolidation and merger. They urge rather that Congress used the words interchangeably, as synonyms, to connote the generic

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[3] Senate Report No. 1104, Senate Committee on Banking & Currency, 81st Cong., 2d Sess. (Sept. 23, 1949); 1950 U.S. Code Cong. Service, p. 3012.

concept of corporate combination. The appellees, who hinted that the "and—or" language might have been a slip of the pen, now argue that when Congress used the words merge and consolidate, it meant merge and consolidate in the technical sense.

In spite of the numerous arguments advanced by the appellants, their case must rest or fall on the validity of two assertions: (1) that Congress by its 1933 amendment (subsection B. 1., infra) made it clear that Congress was using the words merger and consolidation to connote a generic meaning of corporate combination; and (2) the 1952 addition, Title 28, U.S.C., 215a, was designed solely to give different treatment to dissenting shareholders in the merger situation and was not a recognition of the technical differences between consolidation and merger. We proceed to a study of these contentions.

1. *The 1933 Amendment*

In 1913, Congress enacted the predecessor of Title 12, U.S.C., Section 354 which permitted state to national conversions. In 1927, Congress enacted legislation which provided for state to national consolidations.[5] In 1933, Congress amended the 1927 statute to provide:[6]

> ". . . Upon such a consolidation . . . the corporate existence of each of the constituent banks and national banking associations participating in such consolidation shall be *merged* into and *continued* in

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4 38 Stat. 258.

5 44 Stat. 1225, originally codified as 12 U.S.C. §34a, modified in 1959 and recodified as 12 U.S.C. §215.

6 48 Stat. 190, amending what was originally codified as 12 U.S.C. §34a.

> the consolidated national banking association and the consolidated association *shall be deemed to be the same corporation as each of the constituent institutions.*" (Emphasis supplied).

The appellants suggest that this amendment recognizes and allows state banks to merge with national banks even though the amendment is addressed to the problem of consolidation. The appellants reach this conclusion by pointing out the essential characteristics of a consolidation and of a merger. Oversimplified, a consolidation results in the formation of a new corporation while in a merger at least one of the constituents retains its identity. The appellants reason that by providing for the continuance of the corporate entity of the transferring bank the Congress was recognizing the equivalence of merger and consolidation. We disagree.

The 1933 amendment was not intended to and does not eliminate the distinction between merger and consolidation. The statutory language relied on bears no resemblance to the attributes of either a merger or a consolidation. The language refers to the corporate existence for a limited purpose of all constituents, while in a merger the separate entity of one constituent is retained for all purposes and in consolidation the separate identity of neither is retained. A reading of the statute reveals that the limited purpose of the language in question is merely to "secure the continuing efficacy of previous fiduciary appointments of each of the constituent banks." *Commissioner v. Morris Trust,* 4 Cir. 1963, 367 F.2d 794, 801. In sum, we reject the appellants' theory that Congress intended by its 1933 amendment to provide for merger of state banks with national banks. We cannot accept appellants' reading of the statute. It is too broad.

2. *Section 215a*

The appellants glean solace from the fact that when Sections 214-214c was enacted there was no specific corresponding statute permitting state to national mergers. They suggest that it would be unthinkable to conclude that Congress meant to provide for conversion, merger, and consolidation in the national to state context while allowing only conversion and consolidation in state to national transfers.

They urge that such a construction would violate the express purpose of Sections 214-214c, i.e. to provide equality between the two banking systems. The appellants reason that this glaring inequity can only be reconciled by inferring that Congress in Sections 214-214c was using the terms, merger and consolidation, to describe the same thing, corporate combination. We believe that the legislative history reveals a likelier explanation.

Under the current statutory scheme, there are two distinct statutes pertaining to consolidation (12 U.S.C., § 215) and merger (12 U.S.C., §215a). Although the merger statute was not passed until the next Congress after the enactment of Sections 214-214c, there is merit to the appellee's suggestion that Sections 214-214c and 215a were part of the same legislative package and that passage of 215a was inexplicably delayed until 1952.[7] The slowness of the

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7 Mr. L. A. Jennings, First Deputy Comptroller of Currency thus stated in his testimony in support of the merger statute in hearings before the House Committee on Banking & Currency (Miscellaneous Hearings, Committee on Banking and Currency, House of Representatives, 82nd Cong., on S. 2128 (Document No. 91117), at p. 104):

> "And we must recognize that the *companion measure,* called the two-way street measure, now makes it rather easy for national banks to convert into State institutions". (Emphasis supplied).

legislative process could provide a simple explanation for the alleged inequity between the two systems.

In any event, our holding is not dependent upon such a determination. Sections 215 and 215a cannot be reconciled by the synonym theory of the appellants. It is unlikely that Congress would enact separate statutes to describe mere synonyms. Comparison of the statutes confirms this thought.

Section 215a appears in Title 12, U.S. Code, with the title "Merger of National Banks or State Banks into National Banks." It provides for a technical merger though its specific provision that:

> "(a) One or more national banking associations or one or more State banks, with the approval of the Comptroller, . . . *may merge into a national banking association* located within the same State, under the charter of receiving association." (Emphasis added).

"Receiving association" is defined by §215b as "the national banking association into which one or more national banking associations or one or more state banks, located within the state merge." Throughout the six subsections of §215a Congress selectively has used only the term "merge" and its derivatives; the word "consolidate" is not to be found.

Section 215 is titled in the U. S. Code as "Consolidation of National Banks or State Banks with National Banks." It provides for a technical consolidation:

> "(a) Any national banking association or any bank incorporated under the laws of any state may, with the approval of the comptroller *be consolidated with* one or more national banking associations located in the same State under the charter of *a* national banking associations . . ." (Emphasis added).

The term "consolidate" and similar words indicate to us a knowledgeable and selective use. In Sections 215 and 215a Congress has provided separately for merger and consolidation in language which leaves little vitality for appellants' synonym theory.

Leaving aside the literal language of the statutes, the legislative history is highly supportive of our conclusion that Congress intended and advisedly used the terms consolidation and merger in their strict technical sense. The Report of the Committee on Banking and Currency, House Report No. 2421, 1952, U. S. Code Cong. and Adm. News, Vol. 2, p. 2133, states in pertinent part:

> "Section 1 of the act of November 7, 1918, as amended (12 U.S.C. 33), provides a method whereby two or more national banks may consolidate into one bank under the charter of one of the existing banks. Section 3 of the same act, as added (12 U.S.C. 34a). provides a method whereby a State bank may consolidate with a national bank under the Federal charter of the national bank. *There are no Federal statutes providing for the merger of national banks or the merger of State banks with national banks under Federal charter.*
>
> * * * *
>
> "These *merger* provisions would be added to the present provisions of the act of November 7, 1918, as amended, which provide for consolidations, and would leave in existence without change that method of combining. *In either a case of consolidation under the existing statute or merger under the proposed bill,* the approval of the Comptroller of the Currency would have to be obtained.

> Hence there would be an administrative determination in each case as to whether a particular combination should be under the consolidation or merger provisions of the statute." (Emphasis added)

Mr. Jennings, First Deputy Comptroller of Currency, who testified before the Committee stated in part:[8]

> "As you are probably aware, at the present time *consolidations of two national banks, or a State bank and a national bank, are permitted and have been for many years,* on a basis where the holders of two-thirds of the shares of each bank must sanction the proposed consolidation, and at the same time, if there are any dissenting shareholders, they are given the right to dissent and their stock must be appraised and they may receive cash for the stock.
>
> "Now, that type of consolidation, over the years, has worked out very well, *but during recent years several of the States have passed laws which provide for so-called mergers of two institutions.*
>
> *"Now, fundamentally, there is no difference between a consolidation and a merger. The technical form is exactly the same.* The two banks, in effect, *merge or consolidate. . ."* (Emphasis added).

These statements clearly reveal that there was no prior federal law on state to national mergers and federal legislation was necessary to equalize the possibilities of transfer between the two systems. It is clear that 215a was passed with the clear intent to authorize for the first time state to national mergers and not merely to provide different rights to dissenting merger shareholders as suggested by the appellants.

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[8] Id.

In sum, we conclude that the trial court's analysis of the federal law was correct. A national bank may not merge with an Alabama state bank under the state bank's charter unless that state allows an unfettered merger between a state bank and a national bank under the national bank's charter. An examination of Alabama's bank merger laws is thus necessary.

II.

Alabama Law

As related earlier, the first federal legislation permitting state to national transfers was enacted in 1913. In 1915, Alabama responded to the federal legislation of 1913 by enacting a statute which provided state authority for a state to national conversion. This was the predecessor to Title 5, Alabama Code, Section 181. In 1927, Congress enacted legislation permitting state to national consolidation. Again Alabama responded with complementary legislation. In 1931, it enacted an amendment to its 1915 law, so that Alabama permitted both state to national conversions and consolidations without the approval of any state authority. This is now codified as Sections 181-184 of Title 5. It has not been changed since 1931.[9]

Appellants, nonetheless, submit that the Alabama legislature in its wisdom in 1931 anticipated the 1950 change in federal law. We find no indicia demonstrating such prescience.

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[9] We find it significant that 36 states have enacted reciprocal state legislation since the change in the federal laws in 1950. New York, for example, N. Y. Banking Law §137, prior to 1950 had permitted conversions or consolidations of state banks into national banks. Subsequent to 1950, New York passed reciprocal legislation permitting state to national mergers.

The appellants argue that the following language of 5 Alabama Code, Section 184:

> "Upon such conversion or consolidation becoming effective, the national banking association shall be deemed to be a continuation of the entity and of the identity of the state banking corporation" .

provides for the same result following a state to national combination as described in *all* the national banking laws authorizing combination of banks between the two banking systems. The appellants quote too little. The full text of the relevant portion of Section 184 reads:

> "§ 184. Continuation of entity, obligation, etc.— Upon such conversion or consolidation becoming effective, the national banking association shall be deemed to be a continuation of the entity and of the identity of the state banking corporation or trust company and all the rights, obligations and relations of the state banking corporation or trust company to or in respect to any person, estate, creditor, depositor, trustee or beneficiary of any trust, and in, or in respect to, any executorship or trusteeship or other trust or fiduciary function, shall remain unimpaired, and the national banking association as of the time of the taking effect of such change or consolidation shall succeed to all such rights, obligations, relations and trusts, and the duties and liabilities connected therewith, and shall execute and perform each and every such trust or relation in the same manner as if the national banking association had itself assumed the trust of relation, including the obligations and liabilities connected therewith."

The language of Section 184 is strikingly similar to that used in the federal amendment of 1933 discussed in Part I

of this opinion. We think the same conclusion must be reached. The provision relating to the continuance of the corporate entity is designed to preserve intact the duties as fiduciaries of the combining banks. It cannot be strained to provide a missing definition of corporate merger.

Failing that argument, the appellants resurrect their synonym theory discussed with reference to the federal statutes and attempt to apply it to the Alabama statute. The appellants argue that in other dissimilar pre-1931 statutes the Alabama legislature used the words consolidation and merger interchangeably and not in the strict legal sense.

The appellants rely heavily on an Alabama Supreme Court case, *State v. Atlantic Coast Line R. Co.*, 202 Ala. 558, 81 So. 60 (1918) to support this position. That case stated:

> "Accurate logicians very properly distinguish between the meanings of 'consolidation' and 'merger.' Strictly speaking, a consolidation means the unifying of two or more corporations into a single new corporation, having the combined capital, franchises, and powers of all its constituents. And, strictly speaking, a merger means the absorption of one corporation by another, which retains its name and corporate identity, with the added capital, franchises, and powers of the merged corporation. Alabama, T. & N. R.R. Co. v. Tolman, 200 Ala. 449, 76 South. 381; note 89 Am. St. Rep. 607; Noyes on Intercorporate Relations, §§7-11.
>
> "For most purposes, however, and apart from mere questions of identity, the result is in each case practically the same; and so it is that courts and textwriters have usually used the terms 'consolidation' and 'merger' interchangeably, and, in cases of doubt,

> conjunctively, to express the idea of complete corporate union, whether a new corporation nominally results or whether a constituent corporation is nominally preserved." 81 So. at page 62.

The above quote recognizes that "courts and text writers" have used the terms interchangeably, but it does not posit that the Alabama legislature has used the terms in a like manner. A reading of the case reveals that the court concluded that where the legislature used the term, consolidation, in a statute it meant consolidation and not merger. Other courts when construing Alabama statutes using the terms consolidation and merger have likewise declined to hold that the terms were mere synonyms. See *Alabama, T. & N. Ry. v. Tolman,* 200 Ala. 449, 452, 76 So. 381 (1917) and *Alabama Power Company v. McNinch,* D.C. Cir. 1937, 94 F.2d 601.

We find no support in decided cases for the assertion that the Alabama legislature has traditionally used the terms, consolidation and merger, interchangeably. We find no reason to infer that the legislature meant to use the terms as synonyms when it enacted Sections 181-184. We conclude that Sections 181-184 of 5 Alabama Code do not provide for the unfettered merger of a state bank with a national bank under the latter's charter. The Alabama legislature through either design or neglect has failed to respond to the Federal merger provisions enacted in 1950. Since Sections 171-175 of 5 Alabama Code permit bank mergers only with the express approval of the State Banking Superintendent, we are clear in the conclusion that the merger sought here is violative of Federal law.

Our determination is not altered by the Alabama Attorney General's letter-opinion to the Superintendent of Banks of the State of Alabama dated September 30, 1968,

concluding that the conditions set out in Title 12, U.S.C., §214c, have been satisfied by Alabama law and that there is no legal impediment to the transfer of State National into Central under the charter of Central. The appellants argue that we should rely on this opinion as a definitive statement of the Alabama law as this Court did with respect to Florida law in *Dickinson v. First National Bank in Plant City*, 5 Cir. 1968, 400 F.2d 548, 557, affirmed 396 U.S. 122, 90 S.Ct. ____, 24 L.Ed.2d 31 (1969). It is well recognized that state attorney general opinions are advisory in nature. Alabama is no exception. *Holcombe v. Mobile County*. 26 Ala. App. 151, 155 So. 638 (1934). Such opinions are often strongly persuasive. We find that the attorney general's opinion relied upon here falls short of a definitive statement of Alabama law because it gives no reasons for the bald statement that the proposed merger is not violative of state or federal law. Our analysis convinces us to the contrary.

We affirm the district court's determination that the proposed merger is violative of federal law because under Alabama law a state to national merger must be approved by a state official. Since we find that the district court was correct in determining that the merger was defective we need not consider the second ground for the district court's devision that the state law was more restrictive than the federal law.[10]

AFFIRMED.

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[10] Expressed in the district court's opinion, without elaboration, as follows:

> "Moreover, the State law as to notice to stockholders and as to the rights of dissenting stockholders are (sic) more rigid and restrictive in perfecting the merger than Section 214a, although the notice discrepancy is probably inconsequential. Title 10, Section 21 (73) of the Alabama Code".

APPENDIX A—JUDGMENT

United States Court of Appeals

For The Fifth Circuit

October Term, 1969

No. 28452

D. C. Docket No. CA 69-20 & CA 69-38

WILLIAM H. ELLIS,

Plaintiff-Appellee,

versus

STATE NATIONAL BANK OF ALABAMA, ET AL.,

Defendants-Appellants,

and

THE AMERICAN NATIONAL BANK OF GADSDEN, ET AL.,

Plaintiffs-Appellees,

versus

CENTRAL BANK AND TRUST COMPANY, ET AL.,

Defendants-Appellants

Appeal from the United States District Court for the Northern District of Alabama

Before SIMPSON, MORGAN and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

October 28, 1970

Issued As Mandate:

APPENDIX A—OPINION ON REHEARING

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28452

WILLIAM H. ELLIS,
Plaintiff-Appellee,

versus

STATE NATIONAL BANK OF ALABAMA, ET AL.,
Defendants-Appellants,

and

THE AMERICAN NATIONAL BANK OF GADSDEN, ET AL.,
Plaintiffs-Appellees,

versus

CENTRAL BANK AND TRUST COMPANY, ET AL.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Alabama

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Oct. 28, 1970, 5 Cir., 1970, ____ F.2d ____).

(December 29, 1970)

Before SIMPSON, MORGAN and INGRAHAM,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX B—OPINION AND ORDER OF DISTRICT COURT

OPINION
(Filed June 17, 1969)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

THE AMERICAN NATIONAL BANK OF GADSDEN, et al,

Plaintiffs,

v.

CENTRAL BANK & TRUST COMPANY, et al,

Defendants.

Civil Action No. 69-38

WILLIAM H. ELLIS,

Plaintiff,

v.

STATE NATIONAL BANK OF ALABAMA, et al,

Defendants.

Civil Action No. 69-20

This matter came on before the Court on the 2nd day of June 1969, for oral argument on two threshold question presented in these cases which have been consolidated by formal order. These questions are specifically set forth as issues one and two, in the Court's pretrial order of April 18,

1969, entered in Civil Action No. 69-20. In text, the two issues are:

(1) Is the proposed merger between State National Bank of Alabama and the Central Bank and Trust Company legally permissible under existing State and Federal law?

(2) If such merger is permissible, may the surviving bank, Central Bank and Trust Company, retain and operate each of the branches of both banking associations, including State National Bank's main office in Decatur as a branch?

Only if the answer to the first question is in the affirmative will the second question become an issue. A negative answer to the first question concludes further consideration of other existing issues in the case.

An examination of the existing federal law reveals a rather simple formula for the merger of a national bank into a State bank; the situation which is present before the Court. Under Title 12, Sections 214-214 (c) of the United States Code, a national bank is authorized to convert into, merge or consolidate with, a State bank, provided such conversion, merger or consolidation is not in contravention of the law of the state in which the national bank is located. The section further provides, "and no such conversion, merger, or consolidation shall take place unless under the law of the State in which the national bank is located, State banks may without approval of any State authority convert into and merge or consolidate with, national banking associations under limitations or conditions no more restrictive than those contained in Section 214a of this Title . . ." (12 U.S.C.A. 214c). Therefore, the formula is stated, examine the state law and if the limitations and conditions are no more restrictive than Section 214a, and the Court finds that this does not mean "identical conditions and limitations"

and no state approval is necessary, the proposed merger is legally permissible.

After a careful examination of the existing State law, it is the opinion of the Court that the limitations and conditions imposed by the existing State are more restrictive than the federal law and that the expressed approval of the State Superintendent of Banks is required before the consummation of the merger is perfected, hence, the proposed merger is not legally permissible under existing state or federal law.

Under Sections 170-175 of Title 5, Alabama Code, any bank doing business in the State is allowed, with the express approval of the Superintendent of Banks, to merge or consolidate with another bank. It is noted that the merger agreement entered into by the Directors of both State National and Central Bank and Trust Company, recognizes that the approval of the State Superintendent of banking is a prerequisite for consummation of such merger. To satisfy the requirement of Section 214c of Title 12, U.S.C.A., which calls for no State approval in the conversion, merger or consolidation of a State bank into or with a national bank, the defendants herein construe the phrase "convert into and merge or consolidate" of Section 214c, to mean that if a State bank can merge or consolidate with a national bank without State approval, the requirement of Section 214c is satisfied. Under Sections 181-184 of Title 5, Alagama Code, any State bank is allowed to convert into or consolidate with, a national bank without the approval of the State Banking Superintendent. Thus, defendants assert that Sections 181-184 satisfies the requirement of Section 214c. The Court cannot accept the defendants' construction of Section 214c.

The phrase must be construed in light of the entire

statute. In Section 214a, the following terms are used: "The plan of conversion, merger, or consolidation . . .," thus Congress realized that three separate legal operations were involved in approving the statute. The same terms, i.e., "conversion, merger or consolidation" are used in Sections 214b and 214c. The language used by Congress throughout the statute is inducive in construing the statute to mean, that unless a State bank can convert into, merge with and consolidate with a national bank without State approval, then a national bank cannot convert into, merge with and consolidate with a State bank. In other words, if a national bank and a State bank wish to merge, with the surviving bank to be the State bank, the law of the State where the national bank is located must allow a State bank to merge with a national bank without approval of any State authority. Under existing Alabama law, this cannot be accomplished. This construction certainly is the most logical in light of the Congressional intent to keep the national and state banking systems on an equal level of operation as illustrated by the legislative history of Section 214c.

Moreover, the State law as to notice to stockholders and as to the rights of dissenting stockholders are more rigid and restrictive in perfecting the merger than Section 214a, although the notice discrepancy is probably inconsequential. Title 10, Section 21 (73) of the Alabama Code.

The Court having found the proposed merger is not legally permissible under the existing laws, no opinion is expressed as to the remaining issues in the case.

Order to be entered accordingly.
DONE this the 17th day of June 1969.

s/ DANIEL H. THOMAS,
UNITED STATES DISTRICT JUDGE

APPENDIX B

ORDER

(Filed June 17, 1969)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

THE AMERICAN NATIONAL BANK OF GADSDEN, et al,

Plaintiffs,

v.

CENTRAL BANK & TRUST COMPANY, et al,

Defendants.

Civil Action No. 69-38

WILLIAM H. ELLIS,

Plaintiff,

v.

STATE NATIONAL BANK OF ALABAMA, et al,

Defendants.

Civil Action No. 69-20

ORDER

This cause having come on for hearing on the 2nd day of June 1969, and the Court having heard arguments by counsel for the respective parties and the Court after due deliberation having now entered its opinion,

It is ORDERED, ADJUDGED and DECREED by the

Court that the proposed merger between the State National Bank of Alabama and the Central Bank and Trust Company cannot be consummated without the expressed approval of the State Superintendent of Banks and such approval and proposed merger would be in violation of the federal banking laws as set forth in Title 12, Section 214-214c of the United States Code.

It is further ORDERED, ADJUDGED and DECREED by the Court that the defendant banks and defendant directors are hereby enjoined from causing or allowing the doing of any acts to effectuate the merger of State National Bank of Alabama with and into the Central Bank and Trust Company as proposed under the existing State and Federal laws.

It is further ORDERED, ADJUDGED and DECREED by the Court that the defendant State Superintendent of Banks, C. E. Avinger and his successors in office, are hereby enjoined from approving the proceedings of State National Bank of Alabama and of Central Bank & Trust Company for effectuating of the merger of State National Bank of Alabama with and into Central Bank & Trust as proposed under the existing State and Federal laws and from issuing any certificate of approval for such proposed merger.

Cost to be taxed against the defendants.
DONE this the 17th day of June 1969.

s/ DANIEL H. THOMAS,
UNITED STATES DISTRICT JUDGE

APPENDIX C—STATUTES INVOLVED
FEDERAL STATUTES

UNITED STATES CODE
TITLE 12

§ 214. Definitions

(a) As used in sections 214—214c and 321 of this title the term "State bank" means any bank, banking association, trust company, savings bank (other than a mutual savings bank), or other banking institution which is engaged in the business of receiving deposits and which is incorporated under the laws of any State, any Territory of the United States, Puerto Rico, or the Virgin Islands, or which is operating under the Code of Law for the District of Columbia (except a national banking association).

(b) For purposes of merger or consolidation under sections 214—214c and 321 of this title the term "national banking association" means one or more national banking associations, and the term "State bank" means one or more State banks. Aug. 17, 1950, c. 729, § 1, 64 Stat. 455, amended Sept 3, 1954, c. 1263, § 24, 68 Stat. 1234.

§ 214a. Procedure for conversion, merger, or consolidation—Vote of stockholders

A national banking association may, by vote of the holders of at least two-thirds of each class of its capital stock, convert into, or merge or consolidate with, a State bank in the same State in which the national banking association is located, under a State charter, in the following manner:

Approval of board of directors; publication of notice of stockholders' meeting; waiver of publication; notice by registered or certified mail

(a) The plan of conversion, merger, or consolidation

must be approved by a majority of the entire board of directors of the national banking association. The bank shall publish notice of the time, place, and object of the shareholders' meeting to act upon the plan, in some newspaper with general circulation in the place where the principal office of the national banking association is located, at least once a week for four consecutive weeks: *Provided,* That newspaper publication may be dispensed with entirely if waived by all the shareholders and in the case of a merger or consolidation one publication at least ten days before the meeting shall be sufficient if publication for four weeks is waived by holders of at least two-thirds of each class of capital stock and prior written consent of the Comptroller of the Currency is obtained. The national banking association shall send such notice to each shareholder of record by registered mail or by certified mail at least ten days prior to the meeting, which notice may be waived specifically by any shareholder.

Rights of dissenting stockholders

(b) A shareholder of a national banking association who votes against the conversion, merger, or consolidation, or who has given notice in writing to the bank at or prior to such meeting that he dissents from the plan, shall be entitled to receive in cash the value of the shares held by him, if and when the conversion, merger, or consolidation is consummated, upon written request made to the resulting State bank at any time before thirty days after the date of consummation of such conversion, merger, or consolidation, accompanied by the surrender of his stock certificates. The value of such shares shall be determined as of the date on which the shareholders' meeting was held authorizing the conversion, merger, or consolidation, by a committee of three persons, one to be selected by unanimous vote of the dissenting shareholders entitled to receive the value of their

shares, one by the directors of the resulting State bank, and the third by the two so chosen. The valuation agreed upon by any two of three appraisers thus chosen shall govern; but, if the value so fixed shall not be satisfactory to any dissenting shareholder who has requested payment as provided herein, such shareholder may within five days after being notified of the appraised value of his shares appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding as to the value of the shares of the appellant. If, within ninety days from the date of consummation of the conversion, merger, or consolidation, for any reason one or more of the appraisers is not selected as herein provided, or the appraisers fail to determine the value of such shares, the Comptroller shall upon written request of any interested party, cause an appraisal to be made, which shall be final and binding on all parties. The expenses of the Comptroller in making the reappraisal, or the appraisal as the case may be, shall be paid by the resulting State bank. The plan of conversion, merger, or consolidation shall provide the manner of disposing of the shares of the resulting State bank not taken by the dissenting shareholders of the national banking association. Aug. 17, 1950, c. 729, § 2, 64 Stat. 455, amended June 11, 1960, Pub. L. 86—507, § 1 (10), 74 Stat. 200.

§ 214b. Continuation of business and corporate entity

The franchise of a national banking association as a national banking association shall automatically terminate when its conversion into or its merger or consolidation with a State bank under a State charter is consummated and the resulting State bank shall be considered the same business and corporate entity as the national banking association, although as to rights, powers, and duties the resulting bank is a State bank. Any reference to such national banking association in any contract, will, or document shall be con-

sidered a reference to the State bank if not inconsistent with the provisions of the contract, will, or document or applicable law. Aug. 17, 1950, c. 729, § 3, 64 Stat. 456.

§ 214c. Conversions in contravention of State law

No conversion of a national banking association into a State bank or its merger or consolidation with a State bank shall take place under sections 214-214c and 321 of this title in contravention of the law of the State in which the national banking association is located; and no such conversion, merger, or consolidation shall take place under said sections unless under the law of the State in which such national banking association is located State banks may without approval by any State authority convert into and merge or consolidate with national banking associations under limitations or conditions no more restrictive than those contained in section 214a of this title with respect to the conversion of a national bank into, or merger or consolidation of a national bank with, a State bank under State charter. Aug. 17, 1950, c. 729, § 4, 64 Stat. 456, amended July 12, 1952, c. 696, 66 Stat. 590; Sept. 3, 1954, c. 1263, § 25, 68 Stat. 1235.

STATE STATUTES
CODE OF ALABAMA 1940 (RECOMP. 1958)
TITLE 5

§ 181. (6385) Conversion of state bank or trust company into or consolidation with national bank.—Any banking corporation or trust company organized under any general or special law of this state may, with the consent of the holders of a majority in amount of its stock, obtained at a meeting of the stockholders called therefor, be converted into or consolidated with a national banking association in such manner as may, at the time of such conversion or consolidation, be prescribed by the laws of congress, and the stock of such state banking corporation or trust company may be exchanged for stock in such national banking association upon such terms as the consenting stockholders may, at the meeting at which the conversion or consolidation is authorized, determine, or upon such terms as the holders of a majority of the stock of such state banking corporation or trust company may, at any other meeting called for such purpose, determine. (1915, p. 77; 1931, p. 127.)

§ 182. (6386) Meeting for purpose of conversion or consolidation.—All meetings of stockholders, called for any of the purposes provided for in the preceding section, shall be called by resolution of the board of directors, and notice of such meeting and of the purposes thereof shall be published once a week for thirty days prior to the date of such meeting in some newspaper published in the city, town or village in which the principal place of business of said state banking corporation or trust company is located, but if no daily or weekly newspaper is published in such place, then the publication shall be made in a newspaper published nearest thereto. (1915, p. 77; 1931, p. 127.)

§ 183. Transfer of property to national banking association.—At the time when such conversion of or consolidation by the state banking corporation or trust company with a national banking association, under the charter of the latter, becomes effective, all the property of the state banking corporation or trust company, including all its rights, title and interest in and to all property of whatsoever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest and asset of any conceivable value or benefit then existing, belonging or appertaining to it or which would inure to it, shall immediately, by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of the national banking association, which shall have, hold and enjoy the same in its own right as fully and to the same extent, as if the same were possessed, held and enjoyed by the state banking corporation or trust company. (1931, p. 127.)

§ 184. Continuation of entity, obligation, etc.—Upon such conversion or consolidation becoming effective, the national banking association shall be deemed to be a continuation of the entity and of the identity of the state banking corporation or trust company and all the rights, obligations and relations of the state banking corporation or trust company to or in respect to any person, estate, creditor, depositor, trustee or beneficiary of any trust, and in, or in respect to, any executorship or trusteeship or other trust or fiduciary function, shall remain unimpaired, and the national banking association as of the time of the taking effect of such change or consolidation shall succeed to all such rights, obligations, relations and trusts, and the duties and liabilities connected therewith, and shall execute and perform each and every such trust or relation in the same manner as if the national banking association had itself

assumed the trust of relation, including the obligations and liabilities connected therewith. If the state banking corporation or trust company is acting as administrator, co-administrator, executor, co-executor, trustee or co-trustee of or in respect to any estate or trust being administered under the laws of this state, such relation, as well as any other or similar fiduciary relations, and all rights, privileges, duties, and obligations connected therewith shall remain unimpaired and shall continue into and in said national banking association from and as of the time of the taking effect of such conversion or consolidation, irrespective of the date when any such relation may have been created or established and irrespective of the date of any trust agreement relating thereto or the date of the death of any testator or decedent whose estate is being so administered. Nothing done in connection with the consolidation of a state banking corporation or trust company with a national banking association, shall, in respect to any such executorship, trusteeship or similar fiduciary relation, be deemed to be or to effect, under the laws of this state, a renunciation or revocation of any letters of administration or letters testamentary pertaining to such relation, nor a removal or resignation from any such executorship or trusteeship or other fiduciary relationship, nor shall the same be deemed to be of the same effect as if the executor or trustee or other fiduciary had died or otherwise become incompetent to act. (1931, p. 127.)

APPENDIX C—LEGISLATIVE HISTORY

1950 U.S. CODE CONGRESSIONAL SERVICE, PAGE 3012
(Committee Report on 12 U.S.C. 214-214c)

NATIONAL BANKING ASSOCIATIONS— CONVERSION INTO STATE BANKS

Senate Report No. 1104, Sept. 23, 1949
[To accompany H.R. 1161]
House Report No. 1083, July 20, 1949
[To accompany H.R. 1161]
The Senate Report repeats in substance the House Report.

Senate Report No. 1104

The Committe on Banking and Currency, to whom was referred the bill (H.R. 1161) to provide for the conversion of national banking associations into and their merger or consolidation with State banks, and for other purposes, having considered the same, report favorably thereon without amendment and recommended that the bill do pass.

GENERAL STATEMENT

The bill is designed to place national banks on a more equal basis with State banks with respect to transferring from one banking system (State or National) to the other, by way of conversion, merger, or consolidation.

At the present time a State bank can convert into, or consolidate with, a national bank by obtaining the approval of the Comptroller of the Currency, unless it is forbidden to do so by the law of the State in which it is located. On the other hand, a national bank has no statutory right to convert into a State bank, or to consolidate with a

State bank under the latter's charter. This bill would provide such a "right," without the approval of the Comptroller of the Currency, if, under the law of the State in which the national bank is located, a State bank may, without the approval of any State authority, convert into or merge or consolidate with a national bank in accordance with Federal law, with certain restrictions aimed at preventing undue reduction of capital funds in the process of conversions or consolidations. In other words it provides a more equitable "two-way conversion street" for national and State banks.

Historically, national banks always have been free to leave the national banking system in order to enter a State system, although the procedure required the liquidation of the national bank and the transfer of its assets to an existing or newly organized State bank.

Until recent years the necessity for voluntary liquidation, as a condition precedent to consolidation of a national bank with a State bank under the charter of the latter, or to conversion into a State bank, has not been of great importance because it constituted a mere formality. Many national banks have been placed in voluntary liquidation by their shareholders and their assets transferred to newly organized State banks, often for the purpose of permitting them to operate on a smaller capital than is required of national banks or to charge exchange on checks drawn by their depositors.

However, in recent years, this formality has developed into an obstacle because of its taxation aspects. This is true especially in cases where the capital position of the national bank is such that upon liquidation a substantial portion of the capital structure might constitute a taxable gain, and where the Federal tax laws favor a statutory consolidation.

If we are to have a dual banking system with national banks operating side by side with State banks, with State banks being permitted to convert into national associations or to consolidate with national banks and thus continue the banking business under a national charter, then a tax obstacle should not stand in the way of complete duality—of freedom of egress by banks from the national system. Sections 1, 2, and 3 of the bill would provide the basis for such equality of tax treatment.

The bill would protect dissenting shareholders of national banks who were opposed to a proposed conversion or consolidation by permitting them to receive the value of their stock in cash. Depositors would not be injured, because they could withdraw their funds. In this connection it is to be noted that even though a national bank converted into a State bank, it could not terminate its insured status under the Federal Deposit Insurance Corporation Act without giving 90 days' notice to the Corporation, and all deposits covered by insurance would remain so covered for a period of 2 years. Furthermore, a national bank cannot consolidate with an uninsured State bank except with the consent of the Federal Deposit Insurance Corporation which constitutes a protection for such depositors.

The bill provides a greater degree of equality as between national banks and State banks, and adequately protects both the depositors and the shareholders of a national bank, which converts into a State bank, or consolidates with the State bank under that banks' charter.

1952 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, PAGE 2133

(Committee Report on 12 U.S.C. 34b, which was recodified as 12 U.S.C. 215a)

BANKS—MERGER

Senate Report No. 753, Sept. 14, 1951
[To accompany S. 2128]
House Report No. 2421, July 1, 1952
[To accompany S. 2128]
The House Report repeats in substance the Senate Report.

House Report No. 2421

The Committee on Banking and Currency, to whom was referred the bill (S. 2128) to provide for the merger of two or more national banking associations and for the merger of State banks with national banking associations, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

GENERAL STATEMENT

The bill would provide for the merger of two or more national banking associations, and for the merger of State banks with national banking associations under Federal charter.

Section 1 of the act of November 7, 1918, as amended (12 U.S.C. 33), provides a method whereby two or more national banks may consolidate into one bank under the charter of one of the existing banks. Section 3 of the same act, as added (12 U.S.C. 34a), provides a method whereby a State bank may consolidate with a national bank under the Federal charter of the national bank. There are no

Federal statutes providing for the merger of national banks or the merger of State banks with national banks under Federal charter.

One of the characteristics of the provisions authorizing consolidations under Federal charter is that the dissenting shareholders of each constituent bank are entitled to be paid in cash by the consolidated bank for the value of their shares. On the other hand, there is authority in some States for consolidations or mergers of State banks under which the right of dissenting shareholders to obtain the value of their shares in cash either does not exist or is confined to shareholders of the absorbed bank (in most instances a small bank being absorbed by a large bank).

The fact that dissenting shareholders of each constituent bank are entitled to be paid in cash for the value of their shares when banks consolidate under the Federal statute has not presented an impediment to consolidations of banks of approximately the same size. It has been an impediment, however, to large national banks with correspondingly large numbers of shareholders acquiring small banks by consolidation, because of the risk that hundreds or thousands of the absorbing bank's own shareholders may demand the value of their shares in cash, particularly where the actual value is higher than the prevailing market price. There is therefore a disadvantage to consolidating under Federal charter as compared to consolidating under State law.

While this comparative disadvantage has existed for some time, it did not become significant until the act of August 17, 1950 (Public Law 706, 81st Cong.), favorably reported by your committee, provided a method through which national banks can transfer into State systems. It is your committee's view that in view of the fact that these transfers out of the national system are now easily consummated,

the existence of the comparative disadvantage to consolidations under Federal charter may cause banks in some States to leave the national system in order to secure the benefits of State law for subsequent consolidations or mergers which they have in mind.

"Your committee therefore believes that it is desirable that there be made available a method whereby national banks may combine with other national banks, and State banks may combine with national banks under Federal charter, without a right in dissenting shareholders of the absorbing bank to demand cash payment for shares. This would achieve that desirable end by authorizing a new method of merger, one feature of which would be that only the dissenting shareholders of the absorbed bank would be entitled *to demand cash for their shares."*

These merger provisions would be added to the present provisions of the act of November 7, 1918, as amended, which provide for consolidation, and would leave in existence without change that method of combining. In either a case of consolidation under the existing statute or merger under the proposed bill, the approval of the Comptroller of the Currency would have to be obtained. Hence there would be an administrative determination in each case as to whether a particular combination should be under the consolidation or merger provisions of the statute.

This bill is not intended to and does not repeal the congressional policy on branches as reflected in sections 36 and 81 of title 12 of the United States Code.

The Treasury Department and the Comptroller of the Currency recommend its enactment. (Emphasis added)

1952 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, PAGE 2103

(Committee Report on 1952 Amendment to 12 U.S.C. 214c)

NATIONAL BANKS—MERGER AND CONSOLIDATION WITH STATE BANKS

Senate Report No. 940, Oct. 11, 1951
[To accompany S. 2252]
House Report No. 2422, July 1, 1952
[To accompany S. 2252]

The House Report repeats in substance the Senate Report.

House Report No. 2422

The Committee on Banking and Currency, to whom was referred the bill (S. 2252) to clarify the act of August 17, 1950, providing for the conversion of national banks into and their merger and consolidation with State banks, having considered the same, report favorably thereon without amendment and recommended that the bill do pass.

GENERAL STATEMENT

Public Law 706, an act to provide for the conversion of national banking associations into and their merger and consolidation with State banks, was passed by the Congress in 1950. It was intended to enable national banks to convert into or consolidate with State banks under State charter; that is, to afford a right similar but converse to that enjoyed by State banks converting into and consolidating with national banks—a two-way street, so to speak.

Section 2 of that act sets forth the procedure under which a national bank can transfer into the State system. This

procedure prescribes, among other things, that a national bank can convert into or merge or consolidate with a State bank upon a vote of the holders of not less than two-thirds of the stock, and that dissenting shareholders shall be entitled to the value of their stock in cash. In addition to these requirements in section 2, however, section 4 of the act contains the following limitation:

and no such conversion, merger, or consolidation shall take place under this act unless under the law of the State in which such national banking association is located State banks may without approval by any State authority convert into and merge or consolidate with national banking associations *as provided by Federal law*. [Italics added.]

With respect to consolidations, the Federal law to which this reference is made in section 4 contains provisions relating to the vote required for approval and the payment of dissenting shareholders similar to those in section 2 for a consolidation in the other direction (12 U.S.C. 34a).

With respect to conversions, however, the Federal law to which the reference is made in section 4 provides that a State bank may convert into a national bank upon a vote of the holders of only 51 percent of the stock, and it contains no provision for the payment of cash to dissenting shareholders for the value of their stock (12 U.S.C. 35). This provision, your committee wishes to point out, does not impose conditions on a nationalwise conversion as onerous as section 2 of Public Law 706 imposes on a Statewise conversion. The limitation in section 4 therefore becomes significant because it cuts off the National-to-State street if a State's law governing nationalwise conversions imposes conditions parallel to those prescribed in section 2 of Public Law 706 for the National-to-State street.

Since the enactment of Public Law 706, several instances have occurred in which State legislatures have in fact enacted laws imposing conditions on State-to-National conversions patterned after those contained in section 2 of Public Law 706 for National-to-State conversions. But, this has cut off the National-to-State street because the requirement of section 4 has not been met.

Your committee believes the illustration of the action of Minnesota with reference to this law might be illuminating. The Minnesota Legislature, doubtless noting the conditions precedent in section 2 of Public Law 706 with respect to vote of approval and payment of dissenting shareholders, enacted a law which imposes identical conditions upon State banks transferring out of the State system into the National system. Unfortunately, however, this Minnesota law prevents Minnesota from being a State under whose laws a State bank may convert into a national banking association "as provided by Federal law," because as indicated above the applicable Federal law provides for conversion of a State bank into a National bank upon a vote of the holders of only 51 percent of the stock with no provision for cash payment for dissenting stockholders, as compared with the provision under the Minnesota law requiring a vote of two-thirds of the stockholders and cash payment for dissenting stockholders. Accordingly, section 4 of Public Law 706, as it is now phrased, makes transfers out of the National system and into the State system impossible in Minnesota.

Since it was the purpose of Public Law 706 to provide an equitable two-way street provision in the Federal Statutes, the Treasury Department and the Comptroller of the Currency propose that the law be amended so that the limitation in section 4 beyond which State law cannot go (without depriving National banks in that State of the benefits of

Public Law 706) will be measured by the standard set out in section 2 for National-to-State conversions and consolidations, rather than by the minimum requirements prescribed by other Federal Statutes, for transfers in the same direction as those the State laws will govern.

In order to carry out our intent in Public Law 706 to place National banks and State banks on an equal footing with respect to conditions under which they might change from one system to the other, your committee unanimously recommends that this bill do pass.